

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES E. BARRY,) Case No. CV 08-3880 PJW
Plaintiff,)
v.) MEMORANDUM OPINION AND ORDER
MICHAEL J. ASTRUE,)
Commissioner of the)
Social Security Administration,)
Defendant.)

Before the Court is Plaintiff's appeal of a decision by Defendant Social Security Administration ("the Agency"), denying his application for Supplemental Security Income ("SSI"). Because the Agency's decision that Plaintiff was not disabled is supported by substantial evidence, it is affirmed.

In November 2001, Plaintiff applied for SSI. (Administrative Record ("AR") 50-53.) The Agency denied the application initially and on reconsideration. (AR 37-44.) After holding a hearing on October 27, 2004, at which Plaintiff appeared with counsel and testified, an Administrative Law Judge ("ALJ") issued a decision on November 17, 2004, denying the application. (AR 16-23, 389-404.) Plaintiff sought review in this court, which reversed the Agency's decision and

1 remanded the case for further proceedings. (AR 443-58.) On remand, a
2 different ALJ held a new hearing. (AR 744-75.) Plaintiff again
3 appeared with counsel and testified. (AR 744-63.) The ALJ
4 subsequently issued a decision denying the application. (AR 417-27.)
5 Plaintiff appealed to the Appeals Council, which denied Plaintiff's
6 request for review. (AR 405-07, 413-16.) He then commenced this
7 action.

8 Plaintiff claims that the ALJ failed to properly consider the
9 opinion of examining physician Barry Gwartz. He points out that, even
10 though the ALJ adopted Dr. Gwartz's residual functional capacity
11 findings, he inexplicably failed to adopt Dr. Gwartz's finding that
12 Plaintiff should never be exposed to dust, odors, fumes, or other
13 pulmonary irritants. (Joint Stip. at 5-7.) In Plaintiff's view, if
14 the ALJ had adopted this limitation, he would have been required to
15 find Plaintiff disabled based on the testimony of the vocational
16 expert, who opined that such a limitation would preclude Plaintiff
17 from performing unskilled work. (Joint Stip. at 7-9.)

18 The Agency disagrees. It argues that Dr. Gwartz's limitation on
19 exposure to fumes and other irritants in a check-the-box form was a
20 mistake. It points out that this finding is contradicted by Dr.
21 Gwartz's narrative report--which does not mention any such limitation
22 --and argues that it is reasonable to infer that the ALJ elected to
23 adopt Dr. Gwartz's narrative report rather than the finding in the
24 check-the-box form. (Joint Stip. at 9-10.) The Agency argues further
25 that because the record does not support a finding that Plaintiff
26 suffered from any respiratory restrictions, the ALJ's error in not
27 pointing out the discrepancy in the check-the-box form was harmless.
28 (Joint Stip. at 10.) For the following reasons, the Court agrees.

1 Dr. Gwartz conducted an internal medicine evaluation of Plaintiff
2 on July 11, 2007. (AR 577-84.) In doing so, he reviewed Plaintiff's
3 medical records and x-ray findings, none of which identified any
4 respiratory issues. (AR 578-79.) He also examined Plaintiff, finding
5 no tenderness in Plaintiff's chest, and nothing remarkable in his
6 lungs. (AR 580.) In his narrative report, he noted that Plaintiff's
7 chief complaint was back pain and weakness in the right leg. (AR
8 577.) He reported that Plaintiff "continues to smoke at least a pack
9 of cigarettes daily but previously smoked upwards to two packs daily."
10 (AR 579.) He concluded that Plaintiff suffered from spondylosis of
11 the lumbar spine, a history of complex partial seizures, a history of
12 alcohol abuse/addiction, and a personality disorder, not otherwise
13 specified. (AR 583.) He opined that Plaintiff would have no
14 postural, manipulative, or push and pull limitations, but "probably
15 should be precluded from working at heights or near hazardous
16 machinery because of his personality style." (AR 583.)

17 Together with his summary narrative report, Dr. Gwartz submitted
18 a check-the-box form entitled, "Medical Source Statement of Ability to
19 Do Work-Related Activities (Physical)." (AR 585-91.) In that form,
20 Dr. Gwartz checked a box indicating that Plaintiff could "never"
21 tolerate exposure to dust, odors, fumes, and pulmonary irritants. (AR
22 589.) He did not, however, complete the portion of the form
23 immediately below the box, which asked him to explain the medical
24 findings on which that limitation was based. (AR 589.)

25 At the administrative hearing in November 2007, Plaintiff
26 testified that he had not worked since he filed his SSI application
27 because of "back injury and mental illnesses." (AR 748.) Although
28 Plaintiff talked about his mental condition and his problems with

1 walking, standing, and sitting, he did not complain about any
2 respiratory or pulmonary condition or limitations, even after his
3 attorney asked him whether he had "any other problems physically
4 besides your back? Does anything else bother you?" (AR 747-55, 756.)

5 When the vocational expert testified, Plaintiff's counsel asked
6 him to consider a hypothetical individual who, in addition to various
7 physical limitations, could not tolerate exposure to dust, odors,
8 fumes, and pulmonary irritants. (AR 765, 766.) The vocational expert
9 replied that such an individual would not be able to perform any
10 unskilled work. (AR 766.)

11 In his decision, the ALJ adopted Dr. Gwartz's residual functional
12 capacity assessment in finding that Plaintiff would be able to perform
13 medium unskilled work, but had to avoid exposure to heights and moving
14 machinery. (AR 422, 424.) Based on the vocational expert's
15 testimony, the ALJ concluded that Plaintiff could perform unskilled
16 work and, therefore, was not disabled. (AR 426.)

17 The Court finds that the ALJ erred in not addressing the
18 contradiction between Dr. Gwartz's written report and the check-the-
19 box form that he filled out at the same time, particularly in view of
20 counsel's reliance at the administrative hearing on the environmental
21 irritants limitation indicated in that form. Given the evident
22 ambiguity regarding the reports, the ALJ should have developed the
23 record further. *See, e.g., Tonapetyan v. Halter*, 242 F.3d 1144, 1150
24 (9th Cir. 2001) ("Ambiguous evidence . . . triggers the ALJ's duty to
25 conduct an appropriate inquiry.") (quotation omitted); *see also* 20
26 C.F.R. § 416.912(e).

27 Nevertheless, the Court concludes that the error was harmless
28 because it was "inconsequential to the ultimate nondisability

1 determination." See *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050,
2 1055 (9th Cir. 2006) (defining harmless error in social security
3 context). For the reasons explained below, the Court concludes that
4 the ALJ's failure to address Dr. Gwartz's finding that Plaintiff
5 should not be exposed to fumes and other irritants does not undermine
6 the ALJ's decision that Plaintiff is not disabled because that
7 limitation was not supported by the record in this case.

8 First, Plaintiff never alleged at any stage of the process that
9 he suffered from a respiratory or pulmonary impairment. Plaintiff
10 applied for SSI based on a seizure disorder and back injury. (AR 50,
11 75.) Examiner Jagvinder Singh, who examined Plaintiff on January 30,
12 2002, noted that he complained of epilepsy and back problems. (AR
13 198.) At the first administrative hearing in October 2004, Plaintiff
14 testified about his back, seizures, and depression, but did not
15 mention any respiratory problems. (AR 393-403.) Nor did he complain
16 of any respiratory or breathing problems at the second administrative
17 hearing. Most tellingly though is the fact that Plaintiff does not
18 argue in the Joint Stipulation that he filed in this court that he
19 suffers from any respiratory ailments. He merely argues that since
20 Dr. Singh checked the box on the form that he should not be exposed to
21 airborne irritants the ALJ should have adopted that finding and
22 concluded that he was disabled.

23 Second, no evidence in the record supports a finding that
24 Plaintiff has a respiratory problem that requires that he not be
25 exposed to fumes or other irritants. Numerous examination records
26 showed Plaintiff's respiratory system to be performing within normal
27 limits. (AR 134, 139, 142, 146, 149, 151, 154, 181, 183, 190.)
28 Several physicians specifically reported finding no lung disease. (AR

1 162, 166.) Examiner Singh found on examination that Plaintiff's chest
2 and lungs were "[s]ymmetric with normal excursions. Clear to
3 auscultation throughout." (AR 199.) Though he found that Plaintiff
4 should avoid working in extreme temperatures or near fire, water, and
5 heavy machinery, he did not impose any functional restrictions with
6 respect to exposure to irritants. (AR 201-02.)

7 Similarly, Dr. Gwartz made no findings of any respiratory or
8 pulmonary impairment in his narrative report. (AR 577-84.) Moreover,
9 he specifically noted that Plaintiff continued to smoke "at least a
10 pack of cigarettes daily," (AR 579), a finding at odds with a total
11 restriction on exposure to fumes or odors in the workplace.

12 Finally, Plaintiff does not argue that there is any support in
13 the record for environmental restrictions. Nor does he submit any
14 evidence that did not make it into the record which would support such
15 a restriction.

16 Because the ALJ's failure to address Dr. Gwartz's finding that
17 Plaintiff should not be exposed to pulmonary irritants was harmless,
18 his decision that Plaintiff was not disabled is affirmed.

19 IT IS SO ORDERED.

20 DATED: October 19, 2009.

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PATRICK J. WALSH
24 UNITED STATES MAGISTRATE JUDGE
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